

NO. 82-1993

IN THE  
SUPREME COURT OF THE UNITED STATES

---

October Term 1983

---

WILLIAM H. JOINER, JR.,  
Petitioner

VS.

KAREN H. VASQUEZ,  
Respondent

---

RESPONSE TO PETITION FOR WRIT OF  
CERTIORARI TO THE COURT OF APPEALS OF  
TEXAS FOR THE FIFTH SUPREME JUDICIAL DISTRICT

---

BRIEF FOR RESPONDENT

---

STEVEN G. CONDOS  
300 Expressway Tower  
Dallas, Texas 75206  
(214) 691-1514  
Counsel for Respondent

NO. 82-1993

IN THE  
SUPREME COURT OF THE UNITED STATES

---

October Term 1983

---

WILLIAM H. JOINER, JR.,  
Petitioner

VS.

KAREN H. VASQUEZ,  
Respondent

---

RESPONSE TO PETITION FOR WRIT OF  
CERTIORARI TO THE COURT OF APPEALS OF  
TEXAS FOR THE FIFTH SUPREME JUDICIAL DISTRICT

---

BRIEF FOR RESPONDENT

---

STEVEN G. CONDOS  
300 Expressway Tower  
Dallas, Texas 75206  
(214) 691-1514  
Counsel for Respondent

## TABLE OF CONTENTS

ISSUES PRESENTED . . . . .	ii
LIST OF AUTHORITIES . . . . .	iii
STATEMENT OF THE CASE . . . . .	1
REASONS FOR DENYING THE WRIT . . . . .	
A. There is no significant question of federal constitutional law in this case . . . . .	5
B. The doctrine of res judicata was properly applied in this case . . . . .	10
CONCLUSION . . . . .	12

## ISSUES PRESENTED

- I. Did the Court of Appeals of Texas correctly deny Petitioner's Due Process claim that was based on lack of notice of his parental rights termination suit when Petitioner had proper constructive notice of said proceeding?
- II. Did the Court of Appeals of Texas correctly apply the doctrine of res judicata to bar Petitioner's subsequent Bill of Review in his parental termination suit when Petitioner was denied relief in his first Bill of Review and did not appeal?

## LIST OF AUTHORITIES

<u>Armstrong v. Manzo</u> , 380 U.S. 545 (1950). .	8
<u>Brown v. Brown</u> , 521 SW 2d 750 (Tex.Civ.App.-Houston '14th Dist.' 1975, no writ) . . . . .	9
<u>Castorr v. Brundage</u> , 103 S.Ct. 240 (1982) . . . . .	11
<u>Fuentes v. Shevin</u> , 407 U.S.67 (1972) . . .	6, 10
<u>Gunn v. Cavanaugh</u> , 391 SW 2d 723 (Tex. 1965) . . . . .	9
<u>Lassiter v. Department of Social Services</u> , 452 U.S. 18 (1981) . . . . .	9
<u>Leithold v. Plass</u> , 488 SW 2d 159 (Tex.Civ.App. - Houston '14th Dist.' 1972, no writ) . . . . .	9
<u>Mulland v. Central Hanover Bank and Trust Co.</u> 339 U.S. 306 (1950) . . .	7
<u>Santosky v. Kramer</u> , 455 U.S. 745 (1982). .	8, 9

## STATUTES AND RULES

Tex. Family Code Ann. Sec. 11.09(d), (V.A.T.S. 1982). . . . .	1, 7
--	------

## STATEMENT OF THE CASE

On February 11, 1976, Respondent, Petitioner's ex-wife filed an original petition in cause number 76-165-JUV in a Juvenile Court of Dallas County, Texas to terminate Petitioner's Parental Rights as to his children by her, Rebecca Leigh Joiner and William Bartley Joiner, (Court of Appeals opinion, P. App. A2). Personal service was attempted on Petitioner and, when the citation was returned unexecuted, notice was undertaken through publication, in accordance with Tex. Family Code Sec. 11.09(d). (R. App. A129). An attorney ad litem was appointed to represent Petitioner and a guardian ad litem was appointed to protect the interests of the children. (Court of Appeals opinion, P. App. A2). On June 3, 1976, the Juvenile Court entered a default decree terminating Petitioner's Parental Rights as to both children. (Court of Appeals opinion, P. App. A2-3). On February 24, 1977, Petitioner filed a motion for Bill of Review entitled "Motion for Bill of Review" in the same Juvenile Court of Dallas County, Texas, to set aside the Decree of Termination. (Court of

of Appeals opinion, P. App. A3). The Juvenile Court required Petitioner to establish a meritorious defense to the grounds for termination in accordance with procedures for a Bill of Review. (Court of Appeals opinion, P. App. A9).

Petitioner did not present evidence of a meritorious defense but chose only to attack the Court's jurisdiction in the Termination case. On September 22, 1977, the Juvenile Court denied Petitioner's Motion for Bill of Review. (Court of Appeals opinion, P. App. A4).

Petitioner failed to file an appeal from the denial of the motion for Bill of Review (Court of Appeals opinion, R. App. A1) and in accordance with Texas Rules of Civil Procedure, the judgment by the Juvenile Court became final. On September 27, 1977, Petitioner filed a second Bill of Review in cause number 77-855-W in a District Court of Dallas County, Texas, to set aside the decree of termination. (Court of Appeals opinion, P. App. A4). On March 7, 1978, the District Court denied Petitioner's Motion for Bill of Review upon Respondent's plea of res judicata. (Court of Appeals opinion, P. App. A4). Once again,

Petitioner failed to file an appeal from the denial of the motion for Bill of Review. (Court of Appeals opinion, P. App. A4).

On January 3, 1980, Petitioner filed a third petition for Bill of Review in cause number 80-7-W in the District Court of Dallas County, Texas, for the 304th Judicial District to set aside the Decree of Termination. (Court of Appeals opinion, P. App. A4). On March 21, 1980, Petitioner filed his First Amended Petition for Bill of Review (P. App. A73). Petitioner alleged therein that the Termination Decree was void because the Juvenile Court lacked jurisdiction over him to render the decree since he had not received adequate notice of the termination proceeding against him as required by the due process clause of the Fourteenth Amendment to the United States Constitution. (P. App. A76-84). On April 14, 1980, the District Court denied Petitioner's Petition for Bill of Review as a matter of law. (P. App. A97-98) based upon Respondent's plea for res judicata (P. App. A94-96). Petitioner filed a Motion for Rehearing (P. App. A99-100), which the District Court denied on



May 14, 1980 (P. App. A101).

Petitioner appealed to the Court of Appeals of Texas for the Fifth Supreme Judicial District. Petitioner argued on appeal that the Juvenile Court lacked jurisdiction over him to render the Termination Decree due to lack of adequate notice and had therefore violated his due process rights.

The Court of Appeals affirmed the judgment of the District Court on the ground that Petitioner's first Bill of Review was a direct attack on the Juvenile Court's Judgment on the basis of lack of jurisdiction, the Court had denied the relief sought, and Petitioner did not appeal. Consequently, Petitioner was bound by that adjudication as to the Juvenile Court's jurisdiction. The Court specifically found that Petitioner's "right to attack the Termination Decree died with his failure to appeal from the denial of his first Bill of Review." (Court of Appeals opinion P. App. A12).

The Court of Appeals concluded that imposition of the doctrine of res judicata to bar Petitioner's present Bill of Review was justified by the public policy that "there must be an end

to litigation" and that the disturbing influence of multiple lawsuits upon the environment of young children must be discouraged. (Court of Appeals opinion, P. App. A10, 13-15). On December 11, 1981, the Court of Appeals rendered judgment affirming the judgment of District Court. (P. App. A65). On March 17, 1982, the Court of Appeals overruled Petitioner's Motion for Rehearing (P. App. A67-68). On April 30, 1982, the Court of Appeals overruled Petitioner's Second Amended Motion for Rehearing (P. App. A69). Petitioner then applied for Writ of Error to the Texas Supreme Court. In his Application for Writ of Error, Petitioner attacked the judgment of the Court of Appeals on the ground that the Texas Courts had violated his due process rights. On January 29, 1983, the Supreme Court refused Petitioner's Application for Writ of Error as presenting no reversible error. (P. App. A70-71). On March 9, 1983, the Supreme Court overruled Petitioner's Motion for Rehearing. (P. App. A72).

#### REASONS FOR DENYING THE WRIT

- A. There is no significant question of federal constitutional law in this case.

Petitioner asserts that the termination of his parental rights involved a violation of his procedural Due Process rights under the Fourteenth Amendment to the United States Constitution. However, to show his procedural Due Process rights were violated, Petitioner must show he was not notified of the proceedings in which his rights were terminated and he was not afforded a right to be heard at a meaningful time and place. Fuentes v. Shevin, 407 U.S. 67 (1972).

In this case, an attempt was made to serve Petitioner and, when the citation was returned unexecuted, service was made by publication. (P. App. A2). Petitioner was represented by counsel appointed by the court at the subsequent hearings in this cause, and Petitioner's parental rights were terminated.

There is no attempt made by Petitioner to show that constructive service in itself is a due process violation. Furthermore, virtually all states have some form of constructive notice statutes to facilitate court action when the whereabouts of a defendant are not known. In

Mullane v. Central Hanover Bank and Trust Co.,  
339 U.S. 306 (1950), this court specifically allowed notice by publication as to defendants whose whereabouts could not be ascertained.

The constructive notice given defendant was properly effected under Sec. 11.09, Texas Family Code (V.A.T.S., 1982). However, even if this Court questions the validity of the statute because the notice is only required to be published one time, there exists in Texas further procedural safeguards through which defendants deemed served by constructive notice may assert their rights. Under the Texas Rules of Procedure defendant had two years to attack the default judgment entered against him since service was by publication.

Petitioner did in fact file a motion for Bill of Review eight months after the judgment was entered in this cause, well within the statutory time period. (P. App. A2) That fact is conclusive evidence that he did have notice of the proceeding that terminated his rights, possibly not prior to the original judgment, but clearly

before he had no remedy in the Texas Courts to assert his rights. Petitioner had a hearing, at which he was present and represented by counsel, and the court denied relief because Petitioner failed to assert a meritorious defense to the grounds for termination.

At that point, Petitioner had the procedural right to appeal the trial court's decision on the merits of his bill of review. Petitioner failed to appeal and the judgment became final as to the termination of his parental rights.

Since that time, Petitioner has attempted to reassert the same legal position in two more Bills of Review and has made numerous appeals to Texas Courts. Each time the courts have denied relief based on res judicata.

In support of his arguments, Petitioner relies heavily upon this Court's holdings in Armstrong v. Manzo, 380 U.S. 545 (1950) and Santosky v. Kramer, 455 U.S. 745 (1982). These cases are easily distinguishable from the case at bar. In Armstrong, *supra*, the defendant was given no notice of the proceeding at all, even though the plaintiff knew exactly where

he was living. In Santosky, supra, the issue by this Court was the standard of evidence to be applied in a parental termination case. These cases have no application in this cause; Petitioner has not challenged the standard of evidence and he received proper notice under the correct state statute.

Petitioner also relies on Gunn v. Cavanaugh, 391 SW 2d 723 (Tex. 1965) and Leithold v. Plass, 488 SW 2d 159 (Tex. Civ. App. - Houston '14th Dist.' 1972, no writ). Both of these cases involved adoptions in which the defendant was found to have had no notice because of defective service of process. They are clearly not controlling in this cause.

Petitioner further relies on two cases that are entirely unrelated to this cause of action. In Brown v. Brown, 521 SW 2d 730 (Tex. Civ. App. - Houston '14th Dist.' 1975, no writ), the Texas Court decided that a breach of lease judgment had to be set aside upon motion for Bill of Review because movant had a statutory right to that relief. In Lassiter v. Department of Social Services, 452 U.S. 18 (1981), this Court decided the issue of right to

counsel in a parental rights termination case in favor of the state. It is unreasonable for Petitioner to rely on either of these cases since the issues in the case at bar are completely different.

Petitioner has asserted in his petition for Writ of Certiorari that the totality of these proceedings have violated his due process rights. Under the standard set forth in Fuentes, supra, Texas procedural rules have afforded Petitioner all of his procedural due process rights. Consequently, no federal question of due process rights is present in this case.

B. The doctrine of res judicata was properly applied in this case.

Petitioner also alleges that the doctrine of res judicata should not be applicable to this case because of procedural errors made by Petitioner's counsel at the Juvenile Court proceedings, because his prior counsel failed to appeal from that judgment. This Court has upheld the application of res judicata in countless domestic relations cases because the importance of finality of judgments is

so compelling. Castorr v. Brundage, 103 S. Ct. 240 (1982), denial of cert. The original petition in this cause was filed in February, 1976 (P. App. A2), and Petitioner's arguments have been asserted by him no less than six times over a period of six years. The Texas courts have dismissed Petitioner's appeals without exception based on res judicata to end this litigation and the disruptive effect it has had on the lives of the parties involved.

Petitioner also asserts that res judicata should not apply to this case because he says the termination decree is void. However, the Termination Decree was rendered by a juvenile court that had jurisdiction of the cause, and the decree recites proper service. It was subject to direct attack only on the basis of lack of service and by Petitioner presenting a meritorious defense. Petitioner could not show lack of service since he was properly served by publication. Additionally Petitioner failed to offer a meritorious defense to the grounds for termination of his parental rights. Consequently, Petitioner's direct attack failed and he is bound by that judgment since he

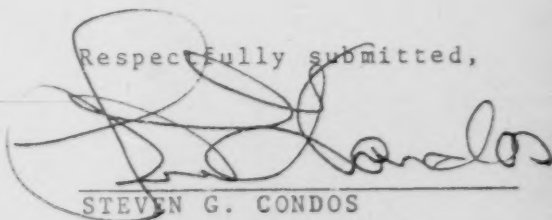


did not appeal it. Therefore, the doctrine of res judicata was properly applied to this case by the Texas Courts.

#### CONCLUSION

The petition for Writ of Certiorari in this cause should be denied because there is no significant question of Federal Law at issue and the doctrine of res judicata was properly applied by the lower courts.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Steven G. Condos", is written over a horizontal line.

STEVEN G. CONDOS  
300 Expressway Tower  
Dallas, Texas 75206  
(214) 691-1514  
Counsel for Respondent

NO. 82-1993

IN THE  
SUPREME COURT OF THE UNITED STATES

---

October Term 1983

---

WILLIAM H. JOINER, JR.,  
Petitioner

VS.

KAREN H. VASQUEZ,  
Respondent

---

RESPONSE TO PETITION FOR WRIT OF  
CERTIORARI TO THE COURT OF APPEALS OF  
TEXAS FOR THE FIFTH SUPREME JUDICIAL DISTRICT

---

RESPONDENT'S APPENDIX

---

STEVEN G. CONDOS  
300 Expressway Tower  
Dallas, Texas 75206  
(214) 691-1514  
Counsel for Respondent

## APPENDIX

NOTE: Respondent would include in its Appendix Ten (10) of the Eighteen (18) listed instruments in Petitioner's Brief as set forth in the attached Table of Contents.

## TABLE OF CONTENTS

Opinions of the Court of Appeals  
of Texas for the Fifth Supreme  
Judicial District and dissenting  
opinions:

Opinion of the court, per  
Guittard, C.J., December  
11, 1981 . . . . . A1

Opinion of the court en banc  
on motion for rehearing, per  
Guittard, C.J., March 17, 1982 . . . . .A21-A31

Judgment of the Court of Appeals  
of Texas for the Fifth Supreme  
Judicial District, December 11, 1981. . . . A65

Order of the Court of Appeals  
of Texas for the Fifth Supreme  
Judicial District overruling  
appellant's motion for rehearing,  
March 17, 1982 . . . . . A67

Record of Order of the Court of  
Appeals of Texas for the Fifth  
Supreme Judicial District over-  
ruling appellant's second amended  
motion for rehearing, April 30, 1982 . . . A69

Order of the Supreme Court of Texas  
refusing petitioner's application  
for writ of error as presenting no  
reversible error, January 29, 1983 . . . . A70

Order of the Supreme Court of Texas  
overruling petitioner's motion for  
rehearing, March 9, 1983 . . . . . A72

Order of the District Court of  
Dallas County, Texas, for the 304th  
Judicial District denying bill of  
review in cause number 80-7-2,  
April 14, 1980 . . . . . A97

Order of the District Court of  
Dallas County, Texas, for the  
304th Judicial District denying  
motion for rehearing in cause  
number 80-7-W, May 14, 1980 . . . . . A101

Texas Family Code, Sec. 11.09(d)

Citation may be given by publication as  
in other civil cases to persons entitled  
to service of citation who cannot be noti-  
fied by personal service or registered  
mail and to persons whose names are un-  
known. The notice shall be published one  
time. If the name of a person entitled  
to service of citation is unknown, the  
notice to be published shall be addressed  
to "All Whom It May Concern." One or  
more causes to be heard on a certain day  
may be included in one notice and hearings  
may be continued from time to time  
without further notice. . . . . A129